

Service Date: February 10, 1994

DEPARTMENT OF PUBLIC SERVICE REGULATION  
BEFORE THE PUBLIC SERVICE COMMISSION  
STATE OF MONTANA

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IN THE MATTER OF JAMES HELGESON,	)	TRANSPORTATION DIVISION
MICHAEL HELGESON, AND STEVEN	)	
WILLIAMS, dba JMS EXPRESS, Billings,	)	
Montana, Application for a Montana	)	DOCKET NO. T-93.81.PCN
Certificate of Public Convenience	)	
and Necessity.	)	ORDER NO. 6278

FINAL ORDER

APPEARANCES

FOR THE APPLICANTS:

Mark David Hoffman, Jones, Hoffman, and Suenram, Attorneys  
at Law, P.O. Box 1366, Dillon, Montana 59725.

FOR THE PROTESTANTS:

Jock West, Attorney at Law, 301 North 27th Street, Billings,  
Montana, appearing on behalf of TBB Limited, Inc., dba  
Billings Yellow Cab.

FOR THE COMMISSION:

Martin Jacobson, PSC Staff Attorney, and Dave Burchett,  
Bureau Chief, PSC Transportation Division, 1701 Prospect  
Avenue, Helena, Montana 59620.

BEFORE:

NANCY MCCAFFREE, Commissioner, Hearing Examiner

FINAL ORDER BEFORE:

BOB ANDERSON, Chairman  
BOB ROWE, Vice-Chairman  
DAVE FISHER, Commissioner  
NANCY MCCAFFREE, Commissioner  
DANNY OBERG, Commissioner

INTRODUCTION

1. On June 14, 1993, James Helgeson, Michael Helgeson, and Steven Williams, a general partnership, dba JMS Express (JMS), filed before the Montana Public Service Commission (PSC) an Application for Intrastate Certificate of Public Convenience and Necessity. JMS requests motor carrier authority, Class B, restaurant prepared food and videos, between all points within Yellowstone County, Montana.

2. Protests to the request by JMS were filed by Diversified Transfer and Storage (Diversified), TBB Limited, Inc., dba Billings Yellow Cab (Yellow Cab), and Foosco, Inc., dba City Cab (City Cab). All Protestants are from Billings (Yellowstone County), Montana, and have existing authority to provide the services proposed by JMS. Diversified withdrew its protest prior to hearing.

3. A public hearing on the application was held October 19, 1993, in Billings. The Applicant and Yellow Cab were represented by counsel. City Cab appeared without legal counsel, but its president, Mark L. Foos (Foos), provided a statement. Witnesses for the Applicant testified, documentary evidence was received, and the parties stipulated to a Final Order. A brief has been submitted by the Applicant, City Cab has filed comments, Yellow Cab did not submit a brief.

4. The PSC has now considered the matter and concludes that a grant of authority to JMS is proper, subject to the terms

of this Order and compliance with the operating requirements prescribed in the laws administered by the PSC.

#### FINDINGS OF FACT

5. All introductory statements which can properly be considered findings of fact and which should be considered as such to preserve the integrity of this Order are incorporated herein as findings of fact.

6. JMS proposes a food delivery service, delivering restaurant-prepared foods from restaurants that traditionally do not deliver. It proposes a central office having an operator and dispatcher to receive calls from the public, relay calls to the restaurant, and dispatch drivers for pickup and delivery.

7. JMS proposes to hire drivers and train them in food handling, familiarity with restaurants, and conduct with the public. It is intended that the drivers will provide their own vehicles, maintaining a clean and smoke-free environment at all times during transportation. JMS will provide thermal transportation containers that will maintain a constant temperature (cold or hot). JMS states that its thermal bags can maintain food temperature within 3 degrees for one hour.

8. JMS intends to coordinate and contract with restaurants

for transportation of prepared foods and will provide service to other restaurants as requested. It proposes to provide or distribute to potential customers, by mail or door-to-door, menus from contracting restaurants. JMS expressed an opinion that restaurants customarily have not contracted with cab companies or others for a similar service.

9. JMS proposes a 11:00 a.m. to 11:00 p.m. service on weekdays and an 11:00 a.m. to 12:00 midnight service on weekends (Friday and Saturday). It proposes a maximum of 30 minutes for delivery and a base charge of \$4 for food delivery.

10. JMS comments that the existing system requires the public to call the restaurant and then the cab company for delivery. JMS agrees that the cab companies can provide a service, but asserts that a cab company prepared-food delivery service is different in quality from that proposed by JMS.

11. A number of JMS witnesses testified that the idea presented by JMS appeared to be good and useful, would be a benefit to them, that they would use the service offered, and that they see a need. Several witnesses expressed that they were not satisfied with the delivery of food in a cab and related several experiences as to the reason why. At least three witnesses stated that they would not eat food delivered in a cab.

12. In addition to the several witnesses testifying at hearing, JMS submitted a "petition" containing over 100 signatures supporting the proposed service.

13. Several JMS witnesses described recent "set-up" or trial food purchases with local cab company delivery. In the two or three instances described, the food had become cold.

14. One JMS witness, a manager of a food business, testified that there are no present transportation businesses actually committed to transporting prepared food. It was the opinion of this witness that the integrity of the restaurant's product and business is at stake in delivery to customers and transportation must commit to preserving this.

15. There is no evidence on the extent to which the service proposed by JMS will harm existing transportation businesses. For all practical purposes it remains only conceivable that JMS's proposed service could take business away from cab companies in two ways -- by transporting food itself and through transportation of food avoiding a need for transportation of people to and from restaurants.

16. Yellow Cab provided no affirmative case in defense, response, or rebuttal of service proposed by JMS. Its participation was limited to cross-examination. City Cab provided no

evidence or comments that would tend to rebut the case presented by JMS.

#### CONCLUSIONS OF LAW

17. All findings of fact which can properly be considered conclusions of law and which should be considered as such to preserve the integrity of this Order are incorporated herein as conclusions of law.

18. At the beginning of the hearing and later in its brief, JMS argued that Yellow Cab's authority does not encompass prepared foods, but only parcels and light packages, and Yellow Cab should be dismissed as a Protestant. This argument is overruled.

"Parcels and light packages" does not, in and of itself, preclude transportation of prepared food.

19. The PSC will grant motor carrier authority when the "public convenience and necessity" requires authorization of the service proposed. See, Section 69-12-323(2), MCA. Public convenience and necessity will be deemed as requiring a grant of intrastate motor carrier authority in Montana when each of its required elements has been demonstrated.

20. In the Matter of Jones Brothers Trucking, Inc., PSC Docket No. T-9469, Order No. 5987a, p. 8 (July 17, 1990), in-

cludes a narrative statement of the required elements:

Applying this language [Sec. 69-12-323, MCA] to the facts presented by any application for authority, the Commission has traditionally undertaken the following analysis: First, it asks whether the Applicant has demonstrated that there is a public need for the proposed services. If the Applicant has not demonstrated public need then the application is denied and there is no further inquiry. Second, if the Applicant has demonstrated a public need for the proposed service, then the Commission asks whether existing carriers can and will meet that need. If demonstrated public need can be met as well by existing carriers as by an Applicant, then, as a general rule, an application for additional authority will be denied. Third, once it is clear that there is public need that cannot be met as well by existing carriers, the Commission asks whether a grant of additional authority will harm the operations of existing carriers contrary to the public interest. If the answer is yes, then the application for new authority will be denied. If the answer is no, then the application will be granted, assuming the Commission determines the Applicant fit to provide the proposed service.

21. The first element concerns a "need" for the service. There must be a demonstrated need for the services proposed. If there is no such demonstrated need, public convenience and necessity does not require a grant of authority. JMS has established a need. Numerous witnesses testified accordingly.

22. The second element involves the ability of existing



motor carriers to meet the demonstrated need. If existing carriers can meet the need, public convenience and necessity does not require a grant of an additional authority. The Protestant cab companies made no affirmative case in this regard. In addition, the witnesses testifying on behalf of JMS did express sufficient dissatisfaction with cab-delivered food.

23. Foos (City Cab), argues that City Cab and Yellow Cab, having existing authority, are ready, willing, and able to provide the service proposed by JMS. Absent affirmative evidence on this, the argument means nothing. Protestants must take an active part in developing a record upon which such arguments can be based. For the most part, the Protestants in this matter did not take sufficient action to preserve their interests (if any).

24. The third element regards the affect that a grant of authority would have on existing transportation services. If existing transportation services would be harmed by a grant of authority contrary to the public interest, public convenience and necessity does not require a grant of authority. There is no evidence demonstrating harm (contrary to the public interest) to existing transportation services.

25. The fourth element is fitness of the Applicant requesting authority to perform the services proposed. If an applicant

is not fit, willing, and able to perform the services, public convenience and necessity does not require a grant of authority.

JMS has demonstrated that it is fit to provide the services proposed.

26. Foos (City Cab) comments that the service proposed by JMS is comprised of transportation of a commodity purchased by JMS for resale to the public and delivery of the commodity is therefore incidental to a primary business and excluded from regulation pursuant to Board of Railroad Commissioners v. Gamble-Robinson Co. 111 Mont. 441, 111 P.2d 306 (1941).

27. Foos's argument is overruled. JMS is not proposing a business that would qualify as being predominant in any aspect other than transportation. The record clearly discloses that transportation is the principal business of JMS. When transportation is the principal business, it cannot be incidental.

28. JMS proposes to hire drivers who provide their own vehicles. JMS must verify that this arrangement (whatever the details of it are) is in accordance with motor carrier law, prior to operations. Verification can be done by contacting the PSC Transportation Division for information on lease, owner-operator, or other applicable arrangements.

ORDER

1. All conclusions of law which can properly be considered an order and which should be considered as such to preserve the integrity of this Order are incorporated herein as an order.

2. The Montana Public Service Commission, being fully apprised of all premises, HEREBY ORDERS that the Application for Intrastate Certificate of Public Convenience and Necessity filed by James Helgeson, Michael Helgeson, and Steven Williams, dba JMS Express, Billings Montana, be GRANTED as follows:

Class B -- Restaurant prepared food and videos between all points in Yellowstone County.

3. The certificate shall be in effect upon compliance with the terms of this Order and the statutes and rules administered by the PSC.

Done and Dated this 31st day of January, 1994 by a vote of 5-0.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

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BOB ANDERSON, Chairman

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BOB ROWE, Vice Chairman

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DAVE FISHER, Commissioner

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NANCY MCCAFFREE, Commissioner

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DANNY OBERG, Commissioner

ATTEST:

Kathlene M. Anderson  
Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.